

## PAPER:

# A BRIEF OVERVIEW OF MALTA, A ROMAN-CIVIL LAW COUNTRY, WITH COMMON LAW ADOPTION AS RULES OF CIVIL EVIDENCE

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**I come from Malta: Malta is known to many as a sun-drenched island in the Mediterranean and a popular tourist destination, a centre for financial services within the European Union, as is Dublin and Luxemburg. The State is also particular in so far as it has a mixed legal tradition – it is traditionally a civil law country; however the common law and sources of English law have become absorbed by the system and form part of the sources, owing to the British experience of Malta.**

In this sense, Malta is among the group of nations that have a mixed legal tradition, which include Scotland, Quebec, Louisiana and South Africa. The obvious reasons for this are historical. Malta has a Roman Law tradition dating from the Punic Wars, however the main imprints were the period of rule of the Order of St John of Jerusalem, Rhodes and Malta – the Knights of St John, and of the two hundred and fifty odd years of British experience, with fundamental links that remain undimmed to date.

In a context that is otherwise within the continental

civil law tradition, the sources of evidence embody the common law rules of evidence. The rules on best evidence and relevance, against hearsay, leading, direct and suggestive questions during examination in chief, (but allowed in cross examination) are part of the system. Likewise with the rules by which a witness cannot be compelled to incriminate him or herself, and the courts are vested with the discretion to prevent a witness from answering questions which tend to expose them to ridicule or degradation. The system has retained the characteristically common law position of oral personal testimony, with the demeanor and behaviour of a witness in the stand acting as determining factors in credibility and consistency.

These rules have operated alongside and been integrated with the continental civil law rules of property and ownership, possession, heirs and legatees, contract, damages, obligation and guarantees. Another illustration of the mixed character of the Maltese system is that the basic private international law rules follow the British rules, with, for example, domicile being the connecting factor in many rules of conflict, saving the recent EU Directives and Regulations on the matter.<sup>1</sup>

<sup>1</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P. 0001 - 0023; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the

matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal L 338, 23/12/2003 P. 0001 - 0029, bis; 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), Official Journal C 027, 26/01/1998 P. 0034 - 0046 and to the First and Second Protocols, adopted by Chapter 482 of the Laws of Malta, <http://docs.justice.gov.mt/lom/>

Legislation/English/Leg/VOL\_15/Chapt482.pdf; a proposed EU Regulation Directive, Rome I, is under discussion to embody the provisions of the Rome Convention referred to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

## The status of digital evidence in civil proceedings

As a court pleader and litigator from a mixed system, the concern and point of this paper is to attempt to assess first, whether digital evidence can qualify as evidence in civil proceedings, and second, to assess how far digital evidence in civil proceedings can be considered to be a reliable and trustworthy source of evidence.

Evidence comprises those facts as established that tend to advance the case and position of a party's case. All legal systems typically possess rules that receive and validate as evidence facts, including rules of exclusion. Although it is acknowledged that it may often be a fine line of distinction between fact, perception of facts and opinions or assessments of facts, since these tend to overlap and blur what appear to be clear differences, evidence is focused on establishing facts. The usual rule is he who alleges is to prove: methods of evidence were traditionally personal testimony by parties, and the exhibition of formal documents, principally paper documents or paper based. By electronic evidence, the specific reference is to that evidence which requires a computer to be demonstrated and therefore to be referred to in pleadings.

More specifically, is whether digital evidence is evidence at all. Evidence includes facts: however, it includes all those direct impressions and conclusions that are useful for the judicial process for forming and establishing conclusions. Evidence establishes the link between what is claimed or defended and the legal and moral justification of the claim. This is naturally linked to what judges and practitioners are well aware of, and often perceived as being the burden of proof. Examples of digital evidence include electronic records as part of invoices to support a charge or a claim for payment, electronic banking transactions in the form of Swift funds across jurisdictions, records of electronic and later inputs for payments, electronic consents and signatures, electronic pirating of websites or of intellectual creations such as designs or logos which are transmitted on-line. Computer content, particularly in civil proceedings, intellectual property piracy for example, remains a core aspect of digital evidence. It is invariably necessary for a person to interpret and evaluate such evidence, and this inevitably remains at the core of the exercise.

## Classification of digital evidence

Digital evidence has an intangible quality, although it can reflect or may reflect or refer to tangible material objects. It may, however, be recorded in a permanent form, which may be available at any time. Human speech and human demeanor in a witness are intangible attributes, yet transcripts of the evidence of a witness may be recorded in a permanent (analogue or digital) form. A finer point is that the recording can be made with the use of a tape recorder (analogue) or a computer (digital). The same analysis can arguably be attributed to digital evidence – it possess an ethereal and an intangible quality, yet at the same time it is capable of recording situations which are pertinent to the facts at issue. All this indicates that for its apparently ephemeral nature, digital evidence can indeed capture and permanently store facts tending to establish or disprove an allegation.

It is suggested that digital evidence in the context of civil proceedings does indeed qualify as civil evidence, albeit of a particular more recent and novel type, but evidence, full and proper evidence, admissible nonetheless. All the criteria of evidence are satisfied: capable of transmission and perception, of being recorded and reduced to permanent form, of challenge, discredit and of independent testing. Digital evidence may bear some resemblance to technical findings since the perception and understanding of the evidence may require specialized knowledge, including in relation to the medium, to enable conclusions to be arrived at.

## Adaptation of traditional rules of evidence to digital evidence

The next question assesses the extent of the assimilation of traditional rules to the new realities of evidence. Here, the Maltese and international experience tends generally to suggest that legal rules of evidence are being adapted to absorb, adapt and include digital evidence among the rules of evidence. Malta has some rules, but not a comprehensive framework on civil digital evidence. The law on electronic signatures essentially reproduces the EU Directive.<sup>2</sup> There are two significant problems in Malta, the lack of a clear legislative framework to take in or relate to such rules, and possibly a cultural reluctance to implement changes to receive digital evidence as evidence. This means that there has been some

<sup>2</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ

L 13, 19.01.2000, p.12; Electronic Commerce Act 2002.

difficulty and some resistance to overcome before effecting the transition from the traditional rules in their familiar context to their application to digital evidence. Following this initial process, however, the conclusion emerges loud and clear, and is resoundingly that digital evidence is part of the rules, inclusionary and exclusionary, of civil evidence.

The next issue is more complex: the extent that digital evidence is a trustworthy source of evidence.<sup>3</sup> This is linked to its probative value and the extent to which that evidence and its face value are proof of their contents. In the same way as the question may arise whether a paper document is forged, it is possible for the concern to be voiced as to any corruption and tampering of evidence and the safeguards against fraud, either by a party or indeed by the court of its own motion. Once digital or analogue evidence is attributed probatory value, then it will be among the factors assessed by a court in arriving at a decision. Clearly, the general rules that evidence, including digital evidence, is open to challenge, has to apply. However, there lurks a general feeling, almost a suspicion, in the mind of many litigators about the relative ease by which digital evidence can be manipulated, precisely because it exists as an electronic intangible creation. This is not to say that litigators are generally averse or resistant to this form of evidence: the sentiment is or tends to be that it is easier to tamper with digital evidence, precisely because of its essential ethereal and fleeting nature, than it is to forge or falsify a paper document. It is also pertinent to point out that paper documents are relatively easy to forge through computers. But lest the reader's *patience murmur* immediately on the digital blindness of the author, it is seemly to add that any change in digital evidence tends to record any changes in its tracks: this is immediately acknowledged without hesitation or qualification. However, the general reluctance to trust digital evidence without reservation remains widespread, especially among practitioners: a factor which may contribute to this view is that computer and electronic training going beyond the elementary program skills have been introduced in law faculties at universities only relatively recently.

### **Distinction between authenticity and veracity**

It is necessary to draw the distinction between authenticity and veracity. Authenticity, as is well known

to Civil Law Notaries, states that a copy is a faithful and true copy of another document. Veracity, on the other hand, is a statement reflecting the truth, accuracy and that the document is a correct reliable statement of what it purports to convey. Veracity therefore refers to the content, that for example an audit confirms that the records presented provide a proper view of the transactions recorded and the state of affairs. This is different from stating that a copy or extracts from, for example, financial statements or minutes are faithful extracts without any comment on the truthfulness of the contents.

There is no principle objection to admitting both the authenticity and veracity of digital evidence. The problem refers to the independent verification (where necessary) and challenging the evidence.

As suggested, digital evidence like other sources of evidence, but possibly even more, may be subject to corruption due to the nature of the input, and may be subject to corruption or falsification: it is probably correct to state that due to the characteristics of digital evidence it is easier to substitute or manipulate, and therefore this requires greater legislative protection: the definition of false or tampered evidence to be extended to clearly include electronic tampering and places. Furthermore, procedural rules should be amended and greater attention be made by practitioners and judges. Reference is not only made to electronic offences as such, but also to situations where evidence may be intentionally presented in the knowledge that it has been tampered with or is not correct.

In this context, the question that therefore arises is whether to make it a criminal offence for knowingly producing digital evidence that is materially false or incomplete, or for the normal sanctions to apply in relation to perjury, a false oath or the knowing submission of forged or fabricated documents. It might be that digital evidence may require more protection in that it is not merely evidence as other forms of evidence, but a quality of evidence that requires higher and additional protection to protect integrity. Malta does have provisions in the Criminal Code entitled 'On Computer misuse'<sup>4</sup> which includes as the offence of impairing the operation of any system, software or 'the integrity or reliability of any data'. However, this is beyond the specific scope of this paper.

A related and more difficult issue is how to challenge digital evidence. It is to be debated whether the

<sup>3</sup> *Vide in this context Stephen Mason, general editor, Electronic Evidence: Disclosure, Discovery & Admissibility, (LexisNexis Butterworths, 2007), Chapter 4.*

<sup>4</sup> *Articles 337B to 337G of the Criminal Code, Chapter 9 of the Laws of Malta, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf).*

traditional means are sufficient or adequate. Digital evidence cannot be cross examined as can a natural person, however it seems that the normal rules are nonetheless applicable. A possible approach could be that while digital evidence, in a similar way that a paper document or a formal statement may not be cross examined, its author (if the author can be determined) certainly may be subject to cross examination. The difficulty is that the challenge to the digital evidence as evidence may have a propensity to focus on the author: and there is nothing novel or specific to digital evidence relating to cross examining the author by whom the input is claimed or attributed.

It is clear that in any adversarial procedure, all the evidence should be available to the parties, and this includes digital evidence, as well as an ample and effective opportunity to contradict and discredit. The conclusion would appear to be that challenging such evidence is achieved through testing the technical aspects of digital evidence whilst also using the normal approach of challenging evidence. On this basis, and subject to adaptation because of the nature of the facts evidenced and the medium of transmission and perception of such evidence, the general rules and principles will apply to digital evidence.

### **The weight and importance to attribute to digital evidence**

There seems no reason why weight should not be attributed to digital evidence in civil proceedings in the same way as with other sources of evidence. The traditional rules include as evidence, documents, technical expertise, ex parte technical opinions, personal testimony, affidavits, and documents. The term 'document' includes not merely physical paper documents, including print-outs of digital evidence, but other tangible material objects – although not all such objects are susceptible of being easily exhibited in legal proceedings.

The conclusion should be that digital evidence in civil proceedings stands on the same basis as other categories of evidence. The admissibility of such evidence will require more regulation to go beyond a computer print-out which might be an extract from the Register, for instance. There will be situations and difficulties where the evidence viewed through a computer is evidence that is admissible by itself, without necessarily having the requirement to be printed. On this basis, because a digital document can be visited, revisited and viewed time and time again as

required, it acquires the character of a permanent recording, and should qualify as evidence as any other source of evidence.

### **Burden of proof, moral certainties and the balance of probabilities**

The general background of Maltese law on civil evidence is defined above, in broad brush terms, with its common law derivation and basis on the subject.

Departing from the assumption that digital evidence in civil proceedings is evidence in the same way as other forms of evidence, the same general rules on the burden of proof should apply, even in the case of civil proceedings. The traditional common law rules on the burden of proof have also been shaped or tempered somewhat by the civil law of evidence. The Maltese formulation is that the burden of proof rests on a balance or a preponderance of probabilities, drawn from facts and possibly inferences. However, this alone is insufficient, and here the continental civil law and possibly canon law influence may be apparent: the balance of probabilities also requires the moral certainty of the court: this notion of moral certainty is the civil law influence. It is settled law and jurisprudence that possibility or even probability alone is not sufficient. The burden of proof requiring moral certainty calls into question the professional integrity and assumption of responsibility of the judge.

The exercise here is to translate these rules and legal language into the realities of civil digital evidence. The mental process remain more or less the same: a first assessment is to relate to the functioning of the electronic or digital systems or the entering of the data with the inclusionary or exclusionary rules of evidence: this in answer to the point whether or not the electronic information or data process qualifies as evidence. The normal considerations at this point tend to be whether the source or the author are identifiable, and whether they be electronically verified independently.

When this preliminary exercise is successfully concluded in the sense that the data or digital evidence does indeed qualify as evidence, the mental assessment attempts to translate the digital data into factual meaning and sense as evidence, within the relevant context under review. The factual implications of digital evidence may or may not require technical knowledge or skills. The essential point here is that such electronic factual data are translated into assessments, evaluations and conclusions, often deductive.

## Digital evidence and the traditional rules of civil evidence

From the above, two important consequences follow. The first is that it follows that the main challenge is to attribute meaning and consequences to digital evidence. Clearly, most facts are 'virtual' or digital and therefore are not tangible. At the same time, they maintain their own train of narrative events and sequence. The second consequence and indeed most important conclusion, is that digital evidence in civil proceedings clearly fits within, and fits well, into the traditional parameters of civil evidence rules. For example, there exists the best evidence rule: this means that a party has to make available, particularly in adversarial systems, the best possible evidence. Digital evidence still has to pass the test of quality and authenticity. It is possible that digital hearsay will develop with its attendant rules, especially when digital documents are rendered into court by one party, but having been derived electronically from another party claiming to have received such source from a third party. Moreover, and in the same vein, the traditional healthy practice of requiring independent evidence to be verified independently where the facts are disputed, finds application in the case of digital evidence. An important existing lead is that related to electronic signatures: the legal framework already exists for the verification of the authenticity of electronic signatures, and to test the authenticity attributed to such signatures.

It is also clear that any application within the context of the traditional rules relating to digital evidence in civil proceedings is to respect fundamentally the principle that proceedings are adversarial or *contradictoire* in nature. Article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its subsequent Protocols may be the most important contemporary influence on civil procedure today: this relates to a fair hearing, and within such meaning, the concept of equality of arms remains fundamental. This requires that a party has full access to the evidence of the other party, a full and proper opportunity to challenge such evidence and full facilities to present his version of the case, facts and submissions – in essence procedural fairness similar to the traditional common law rule of hearing the other side. Any scenario of digital evidence and rules of evidence are clearly subject to the test of conformity with the requirements of a fair hearing. It has become,

in contemporary civil procedure, a fundamental and overriding consideration in any given particular rule of evidence, and digital evidence is no exception.

## Conclusion: the role of law schools and of law firms

It is clear that civil digital evidence is here with us and to stay, whether in respect of substantive issues such as, for instance, copyright or competition issues, or a purely procedural question of evidence. The challenge as always is to adapt and to innovate.

Two concluding observations become relevant. The role of law faculties is important in focusing on the civil procedural aspects of digital evidence: the traditional rules, the contemporary rules, those of professional secrecy, market abuse, insider dealing are all relevant. However, the study of civil evidence also requires the need to focus in a systematic manner on digital evidence as part of the curriculum. What is essential is that it becomes part of the systematic reflection and discipline of the curricula. Moreover, the professional training has to focus on integrating evidence with digital data.

Perhaps, and almost certainly the most critical, remains the development of civil digital evidence in and by law firms. The reason is that practitioners are problem solvers: they address evolving realities, and, in the same way as market developments function, lawyers shape and direct legislative developments.

The aim of this brief paper was to illustrate and elaborate the point that civil digital evidence does indeed qualify as evidence, is subject to the rules in the same way as traditional and contemporary rules of evidence, and those of equality of arms. The final reflections related to the important role of law studies and the critical creative and innovative role of law firms and practitioners.

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